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In the Supreme Court of the United States

OCTOBER TERM, 1998

KORDICE M. DOUGLAS,
PETITIONER

VERSUS

DYNMCDERMOTT PETROLEUM OPERATIONS COMPANY, ET AL
RESPONDENT

CIVIL APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an in-house counsel protected under Section 704(a) of Title VII for reasonably engaging in activities opposing discrimination if, in doing so, she discloses confidential client information?

2. Is the appropriate standard for determining whether conduct is "protected activity" under 704(a) of Title VII the balancing test, used by the majority of the circuits, which weighs the right of an employee to reasonably engage in opposition to unlawful employment practices against the employer's right to run its business?

3. Did the Fifth Circuit correctly apply the balancing test in this case?

4. Did the Fifth Circuit err in finding that Douglas engaged in unethical behavior?

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PETITION FOR WRIT OF CERTIORARI

Kordice M. Douglas ("Douglas") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 18, 1998, which reversed the jury verdict and judgment of the district court, Douglas filed a Petition for Rehearing and Suggestion for Rehearing En Banc, both of which were denied on July 23, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is *Kordice M. Douglas v. DynMcDermott Petroleum Operations Company; John Poindexter,* reported at 144 F3d 364 (5th Cir. 1998). It is reproduced in the appendix at page A-1. The Order and Reasons of the district court trial judge denyng DynMcDermott's post-trial motions and reducing the judgment to comply with the statutory caps is reproduced in the appendix at page B-1.

JURISDICTION

On June 18, 1998, the Fifth Circuit issued its opinion in *Kordice M. Douglas v. DynMcDermott Petroleum Operations Company; John Poindexter,* cited above. On July 23, 1998, the Fifth Circuit denied Douglas's Petition for Rehearing and Suggestion for Rehearing En Banc, which denial is reproduced at page C-1 of the appendix. Pursuant to Supreme Court Rules 13 (1) and 13 (3), this petition has been filed within 90 days of the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc.

The jurisdiction of the Court is invoked pursuant to U.S. Const. art. III, § 2, cl. 2 and 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

This case involves the federal statute Section 704(a) of Title VII, codified at 42 U.S.C. § 2000e-3(a), which reads:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor orgnization to discriminate against any member thereof or applicant for membership, **because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participatd in any manner in an investigation, proceeding, or hearing under this subchapter.** (Emphasis added)

Competing with this federal statute in this case is the Louisiana State Bar Association, Rules of Professional Conduct, Rule 1.6, which is codified at Title 37 Chapter 4-Appendix ("Ethical Rule" 1.6). Ethical Rule 1.6 states as follows:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in Paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Douglas is a black female attorney. She was employed as in-house counsel for Boeing Petroleum Services, Inc. ("BPS") from 1987 until March 31, 1993. At BPS, Douglas interacted with the legal department of the Department of Energy ("DOE") on a daily to weekly basis.

Douglas's employment with DynMcDermott Petroleum Operations Company ("DynMcDermott") began on April 1,

1993. There was no gap between Douglas's employment at BPS and at DynMcDermott. Over 90 percent of the employees that worked at BPS made the transition to employment with DynMcDermott. Both companies had the same task; to operate the Strategic Petroleum Reserve for DOE. The legal staff of BPS became the legal staff at DynMcDermott. The only attorney in the legal department of the newly formed DynMcDermott who had not been with BPS was Defendant John Poindexter, the newly hired general counsel.

In the fall of 1993, Douglas complained to Poindexter about the amount of pay she was receiving, compared to the white male attorneys. Poindexter never took any action concerning Douglas's complaint about not getting equal pay.

The relationship between DynMcDermott and DOE was not purely contractual and at arm's length, as characterized by the Fifth Circuit in its opinion. DynMcDermott worked for DOE and only for DOE. There was a DOE counterpart for every position at DynMcDermott. DynMcDermott employees would interact with their DOE counterparts as often as daily. While employed by DynMcDermott, Douglas interacted with the legal staff at DOE on a daily to weekly basis. Douglas had been instructed by her supervisor when she worked at BPS from 1987 to 1993 that DOE was her client. There was a close working relationship between DOE and DynMcDermott.

DOE has the responsibility to oversee the EEO activities of DynMcDermott. DOE conducted an EEO audit of DynMcDermott in 1994, which lasted from April until September of that year. Although Poindexter had prior notice of the 1994 EEO audit by DOE and Douglas worked in the

EEO area, Douglas was given no prior notice of the EEO audit.

Poindexter called her into an EEO audit meeting on June 6, 1994, when he had difficulty answering questions. Present as the meeting were Douglas, Poindexter and three DOE employees. Poindexter remained present during the entire time that Douglas was answering questions in the audit meeting. In response to the auditors questions, Douglas made the comment of "maybe now I'll get mine (equal pay)". Further, Douglas responded that the situation regarding the women at the sites complaining of unequal pay was a "class action waiting to happen". Poindexter never objected or interrupted Douglas. He did not mention Douglas's comments in the EEO audit until the June 22, 1994, performance evaluation meeting.

During the fifteen months that Douglas worked for Poindexter, he did not complain about her job performance until the performance evaluation meeting that he had with her on June 22, 1994, which was two weeks after the EEO audit meeting. At the performance evaluation meeting, Poindexter gave Douglas a "Fully Satisfactory" overall performance rating, which was lower than "Excellent" and "Above Expectations", and only one rating above "Marginal". Poindexter admitted that he rated Douglas "improvement needed" (lowest possible rating) in the category of Judgment because of her comments in the EEO audit. He also rated her "improvement needed" in the category of Perceptual and Analytical because of the BellSouth matter. They discussed both the EEO audit comments and BellSouth at this meeting. Poindexter also told Douglas that he had discussed with Jocelyn Guarisco, head attorney for the DOE office in New Orleans, what Douglas had said in the EEO audit and they had decided that Douglas had broken a

bar rule. Poindexter would not tell her what bar rule he was referring to.

He then mentioned the Becky Rousell incident, which had been discussed at the EEO audit. Ms. Rousell ("Becky R.") complained about her work station being too hot. Her supervisor Mr. Seagrave ("Brian S.") told her it was not too hot, that it was her and she should go see a doctor. She solved the problem by having building maintenance fix the temperature level at her work station, but she filed a complaint about the insensitive remark of her supervisor. Poindexter told Douglas at the performance evaluation meeting that he had counseled Brian Seagrave privately. Douglas was upset because Poindexter admitted he counseled Seagrave, a white male, but he would not counsel her before giving her a negative performance review that would stay in her personnel file.

Douglas wrote a five page "Response to Retaliatory Evaluation" ("Response Letter") two days after the performance evaluation meeting. In the Response Letter she wrote that she was retaliated against because of her comments in the audit and that she was discriminated against because of her race and gender. See Appendix at page D-1.

Douglas mentioned the Becky Rousell matter in her Response Letter (disguised as Becky R. and Brian S.) because it related directly to her complaint that she was the victim of disparate treatment. Douglas did not get counseled on the negative items of the evaluation until after she was written up in the evaluation about them, but Brian Seagrave (white male) was counseled privately by Poindexter. DOE already knew about the Rousell matter because it was discussed at

the EEO audit meeting and Poindexter had already discussed it with Guarisco, a DOE attorney. Furthermore, the subject matter of the Rousell incident was a routine business matter and did not involve any sensitive or confidential information.

Douglas also mentioned the BellSouth Mobility matter in her Response Letter. Again, as was the case with the Rousell incident, the subject matter of this incident was a routine business and administrative matter and did not concern any sensitive or confidential matter. Also, DOE already knew about this matter. Both DOE and DynMcDermott employees were given company cellular phones. The problem arose when some of the employees ran up large bills and did not pay them. This problem was first assigned to Randy Sutton, white male attorney, who also worked for Poindexter. He did not complete the work on the file and it was then given to Douglas. Douglas drafted an agreement to be signed by the employees that they would reimburse the company for the phone bill. However, this agreement was not approved by the DynMcDermott comptroller Carol Parella because she discussed the matter with DOE and they would not approve this agreement for their employees. This was not a confidential matter. DOE had the same problem with the phone bills that DynMcDermott had. Douglas mentioned the BellSouth Mobility incident in her Response Letter because she was rated low on it and because it was an example of disparate treatment. The white male attorney, Mr. Sutton, did not solve the problem but he was not criticized for it as Douglas was.

Douglas delivered copies of the Response Letter to Poindexter, three other DynMcDermott employees and to

Richard O'Neill, one of the three DOE auditors of the June 6, 1994 audit meeting. The audit was still open when Douglas gave O'Neill the Response Letter. In fact, he was the auditor who asked the most questions in the audit meeting of June 6th. O'Neill was also the whistle blower officer and the DOE official who received EEO complaints of reprisal from Dyn-McDermott employees under the contractor employment protection process. DOE Order 3220.2A entitled "Equal Opportunity in Operating and Onsite Services Contractor Facilities" provides a procedure for complaints of discrimination received by DOE concerning discrimination at a contractor facility to be forwarded to the OFCCP, and then to the EEOC. When Douglas gave a copy of her Response Letter to Mr. O'Neil at DOE, she was submitting a written complaint of discrimination to DOE, a procedure that was permitted by DOE Order 3220.2A.

O'Neill asked Douglas if her Response was a whistle blower action, and she replied that she did not know yet, and she would have to consult with her attorney first. Before she had time to check with her attorney, she was fired on July 7, 1994.

Poindexter on August 15, 1994 wrote a letter to Lansing Barrow, a DOE attorney, who was one of the DOE auditors in the June 6, 1994 audit meeting with Douglas. This letter explains Poindexter's alleged reasons for firing Douglas. (See appendix at page E-1). It states that the evaluation of Douglas did focus on her conduct during the EEO audit interview. It also states that she was terminated because of her violation of legal ethics and that one of the violations of legal ethics was her disclosure of confidential information in the audit interview.

B. JURY VERDICT AND TRIAL COURT RULING

The jury returned its verdict finding that Douglas was discharged in retaliation for engaging in activity protected under Title VII. The jury awarded $7,830 in back pay, $238,840 in compensatory damages, and $375,000 in punitive damages. The trial court reduced Douglas's award to $307,830 to comply with the statutory cap on compensatory and punitive damages. The court denied DynMcDermott's post-trial motion for judgment as a matter of law. See Order and Reasons in appendix at page B-1.

The district court held that there was a legally sufficient evidentiary basis for a reasonable jury to find that her comments at the EEO audit meeting were participation in a "proceeding" under Title VII, or that the comments were in opposition to practices made unlawful by Tilte VII.

The court further found that the dissemination of her Response Letter was clearly protected activity. The document alleges sexism, racism, and retaliation. The court also found that providing a copy of the Response Letter to Richard O'Neill of DOE was not unreasonable, because O'Neil participated in the audit on behalf of DOE. Additionally, the court held that Douglas received what she perceived to be a low evaluation because of the comments she made at the EEO audit meeting.

The court further held that Douglas's mention of the BellSouth Mobility incident in her Response Letter was not unreasonable because she had received a negative rating in her evaluation for her handling of that matter. The court also found that Douglas's discussion of the Becky R. and Brian

S. matter in her Response Letter did not disclose any substantive in-house information. This matter related directly to Douglas's claim of disparate treatment in her performance evaluation."

C. OPINION OF THE COURT OF APPEALS

The Fifth Circuit reversed the verdict and judgment of the district court. It held that Douglas, in giving her Response Letter to O'Neill, violated Ethical Rule 1.6 and that, although this unethical disclosure may constitute opposition to practices made unlawful by Title VII, such conduct is unprotected under Title VII (and Section 1981) as a matter of law. See Opinion reproduced in appendix at page A-1.

REASONS FOR GRANTING THE WRIT

A. A Circuit Split Exists Between the Fifth and Third Circuits Regarding Whether an In-house Counsel Is Protected under Section 704(a) of Title VII for Reasonably Engaging in Activities Opposing Discrimination If, in Doing So, She Discloses Confidential Client Information.

In the only other circuit opinion on this topic, the Third Circuit held that the duty of confidentiality for an in-house counsel under the Pennsylvania Rules of Professional Conduct did not preclude a retaliatory discharge claim, when it reversed the trial court's dismissal of that claim. *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 179 (3d Cir. 1997).

The Third Circuit refused to affirm the dismissal of the retaliatory discharge claim of attorney on the basis that pursuing the claim would improperly implicate communications subject to the attorney-client privilege and/or information relating to *Kachmar's* representation of SunGard.

The Third Circuit cited the Fifth Circuit's *Doe v. A Corp.* in stating, "a lawyer does not forfeit his rights simply because to prove them he must utilize confidential information." 709 F.2d 1043 (5th Cir. 1983). The *Kachmar* court also cited the Oregon State Bar Legal Ethics Comm., Formal Op. 1994-136, which stated an "attorney may disclose confidences to establish a wrongful termination claim where attorney was terminated after refusing to make false representations on a patent claim."

In the *Kachmar* case, the Third Circuit decided that the in-house counsel should be able to pursue his retaliatory discharge claim, and that if the duty of confidentiality was implicated, certain protective measures were available to the trial court, such as sealing and protective orders, limited admissibility of evidence, or in camera inspection. However, **the trial court is to assess the sensitivity of the information** offered at trial before employing any of these measures. Then it can draft a procedure that permits vindicating the plaintiff's rights while preserving the core values underlying the attorney-client relationship. *Kachmar,* 109 F.3d at 182.

In the case at bar, the possible disclosure of confidential information by Douglas involved two incidents. The first incident was the BellSouth Mobility incident, described above, which involved employees in both DynMcDermott and

DOE who had not paid their phone bills. The second incident, the Rousell incident, also described above, involved a possible insensitive remark by a supervisor about an employee who was uncomfortable with the temperature of her workstation. The sensitivity of the information that Douglas put in her Response Letter, was assessed and determined not to be sensitive by the trial judge. Therefore, there was no need in the case at bar to use sealing and protective orders, limited admissibility of evidence, or in camera inspection. Had the information in the case at bar been sensitive, either Douglas or DynMcDermott could have asked for protective measures. However, because the information that Douglas disclosed was not sensitive in nature, no extra security by a court was necessary.

Whether information is sufficiently sensitive to require the use of protective measures is a fact intensive inquiry appropriate for the trial court. As the Fifth Circuit stated in its opinion, " 'Unless the evidence is of such quality and weight that reasonable and impartial jurors could not arrive at such a verdict, the findings of the jury must be upheld.' " See Appendix at page A-10, citing *Ham Marine, Inc. v. Dresser Indus., Inc.*, 72 F.3d 454, 459 (5th Cir. 1995). Nevertheless, the Fifth Circuit reversed the jury verdict and judgment by the trial judge, in contrast to the Third Circuit, that reversed the dismissal of the retaliatory discharge claim, and sent the case to the fact finder to decide the issue.

B. This Fifth Circuit Application of the Balancing Test Conflicts with That of the First, Third, Fourth, Seventh and Ninth Circuits in Determining If Particular Conduct Constitutes Protected Activity under the Opposition Clause of Title VII.

The First Circuit in the case of *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976), used a balancing test to hold that the plaintiff's conduct was not "protected activity" under Title VII when it was balanced against the employer's interest in maintaining a harmonious and congenial working environment. Plaintiff in *Hochstadt* had been constantly complaining to her supervisors and colleagues over her salary and poor rating, which eventually led to extremely hostile and disruptive confrontations throughout the working environment. The Court stated that "Section 704(a) clearly does protect an employee against discharge for filing complaints in good faith before federal and state agencies and for registering grievances through channels appropriate in the particular employment setting." *Hochstadt*, 545 F.2d at 231. In the case at bar, Douglas was making her complaint of unlawful treatment through appropriate channels. The copy of her Response Letter was sent to Mr. O'Neill at DOE because he was involved in the ongoing EEO audit, was the whistle blower officer, and was the officer in charge of EEO complaints. Douglas's conduct was appropriate and reasonable as found by the jury and the district court judge.

In the Third Circuit case of *Hicks v. ABT Associates, Inc.*, 572 F.2d 960 (3rd Cir. 1978), the Court held that by addressing a complaint to the Department of Housing and Urban Development, the source of project funding, plaintiff, a white male who brought a discrimination in employment charge, was in the process of opposing allegedly discriminatory practices by his employer and thus was protected by the Civil Rights Act of 1964. 572 F.2d at 969. *Hicks* is similar to the case at bar in that both plaintiffs took their complaints to a federal agency separate from their employer.

In the Fourth Circuit case of *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253 (4th Cir. 1998), the Court held that:

> To qualify as opposition activity an employee need not engage in the formal process of adjudicating a discrimination claim. Opposition activity encompasses utilizing informal grievance procedures as well as staging informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities. To determine whether an employee has engaged in legitimate opposition activity we employ a balancing test. We "balance the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel."

Id., 149 F.3d at 259 (citations omitted).In the case at bar, Douglas was utilizing informal grievance procedures, and the trial court found that this was a reasonable activity in protest of DynMcDermott's discriminatory and unlawful employment practices.

In the Seventh Circuit case of *Jennings v. Tinley Park Community Consolidated School District No. 146*, 796 F.2d 962 (7th Cir. 1988), the court held that the cloak of Title VII protection does not extend to deliberate attempts to undermine superior's ability to perform his or her job. In *Jennings*, the employee engaged in opposition to perceived unlawful employment practice by participating in conduct which hindered another person's ability to perform his job, thereby

relinquishing stautory protection. The Seventh Circuit applied the balancing test. In the instant case, none of Douglas's activities hindered any supervisor or colleague from doing his or her job. Her opposition to DynMcDermott's discriminatory employment practices was legitimate and reasonable under the circumstances.

The Ninth Circuit in the case of *O'Day v. McDonnell Douglas Helicopter Company*, 79 F.3d 756 (9th Cir. 1996) held that a former employee's conduct in stealing sensitive personnel documents was not protected activity under ADEA's opposition clause. In its opinion, the court stated that it had previously adopted the balancing test for determining whether an employee's conduct constitutes "protected activity" under Title VII. The Court adopted the same balancing test for retaliation claims under the ADEA. "The court must balance the purpose of the Act to protect persons engaging reasonably in activities opposing ... discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Id.* at 763.

In the case at bar, the Fifth Circuit reversed the trial court's finding that Douglas's conduct was reasonable, and characterized her minimal and inconsequential disclosures as "unethical conduct." This led to its holding that any unethical conduct by an attorney is not protected by Title VII. The Fifth Circuit also made a finding that any information that she obtained while employed as in-house counsel could not be disclosed to any third party, or this would be an ethical violation. There was no balancing test for attorneys in this situation. The Fifth Circuit in its opinion acknowledges the balancing test in this Circuit stated in

Jones v. Flagship Int'l, 793 F2d 714 (5th Cir 1986) and *Jefferies v. Harris County Action Ass'n,* 615 F.2d 1025, 1036 (5th Cir. 1980). However, in the case at bar, the Court did not use the balancing test. The Fifth Circuit did not determine if Douglas's conduct was reasonable in light of the circumstances, because it did not balance her rights to engage reasonably in activitives opposing discrimination against the employer's right to operate its business. The Fifth Circuit improperly applied the balancing test required in the First, Third, Fourth, Seventh and Ninth Circuits to determine whether particular conduct constitutes activity protected under the opposition clause of Section 704(a) of Title VII.

Furthermore, the Court added a third prong to the balancing test to insure that Douglas's rights to express her opposition to practices made unlawful by Title VII were outweighed. Her rights were weighed against not only the employer's right to operate its business, but also against the legal profession's interest in assuring ethical conduct of its attorney members. The Fifth Circuit in this case holds that attorneys are not entitled to any analysis as to whether their conduct is reasonable when weighed against the reasonable right of the employer to run its business.

Had the balancing test been used, the Court would have concluded, as did the district court judge, that Douglas's conduct was reasonable under the circumstances. Reasonableness plays a role in the proper application of the balancing test. Douglas was threatened by Poindexter that her comments in the EEO audit broke a bar rule. She had been accused of exercising poor judgment by Poindexter. It was reasonable for her to give a copy of her Response Letter to O'Neill because he was the DOE EEO Auditor who asked

the most questions at the audit. It was reasonable to give this auditor a statement that she was being retaliated against because of the audit that O'Neill was still in the process of conducting. It was also reasonable to give him this document because it was a written statement that Douglas was being discriminated against and O'Neill was the whistle blower officer and the person at DOE who received discrimination and retaliation complaints from DynMcDermott employees.

One holding in the *Doe v. A Corp.* case in the Fifth Circuit is that the conflict between protection of the client's need for confidentiality and the lawyer's opportunity to assert a claim against the client cannot be resolved on the basis that one enjoys universal primacy over the other. 709 F.2d 1043 (5th Cir. 1983). The holding in the instant case states that the employer's interest always prevails if there is any unethical breach of duty by the attorney, which the Fifth Circuit holds to be disclosing **any** information gained during the representation of the client. This disclosure should be balanced against the company's right to run its business. If that had been done in this case, Douglas's right to exercise her rights would have prevailed over the company's right not to have the DOE be told some minor information that it already knew about. The Fifth Circuit described this disclosure of information as taking a "baby step." The trial court described the disclosure as minimal.

C. The Supreme Court Has Never Addressed Whether the Appropriate Standard for Determining Whether Conduct Is "Protected Activity" under 704(a) of Title VII Is the Balancing Test Used in Most of the Circuits.

While there exists a well-developed body of federal law, beginning with the Supreme Court case of *Pickering v. Board of Education Township High School District 205*, regarding whether a public employee enjoys constitutional protection against retaliation for exercising her First Amendment rights, the balancing test for retaliation claims of employees as it relates to employment discrimination cases has not been addressed by the Supreme Court. 391 U.S. 563, 88 S.Ct. 1731 (1968).

The Circuits have developed a body of law using the balancing test to determine when an employee is protected under Title VII to oppose unlawful employment practices. The Fifth Circuit in the case at bar has now added a "pretest" to the balancing test. In the Fifth Circuit now, the balancing test does not apply if you are an attorney whose conduct has breached the state ethics code.

Without calling it a balancing test, the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct 1817 (1973), stated that "nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it." Green had participated in a stall-in to block access to and egress from the employer's plant at a peak traffic hour. In the case at bar, no such "deliberate, unlawful activity" exists.

The Supreme Court should address the balancing test and whether an in-house counsel who discloses a minimal amount of confidential information in opposing unlawful discrimination is subject to the balancing test.

D. The Fifth Circuit Erred in Finding That Douglas Engaged in Unethical Conduct.

In the case of *Doe v. A Corp.*, 709 F.2d 1043 (5th Cir. 1983), the Fifth Circuit held that an in-house counsel did have a right to pursue a legal action on his own behalf for benefits allegedly due him under the company's pension and life insurance plans. The Fifth Circuit discussed Disciplinary Rule 4-101(C), which provides that a lawyer may reveal confidential information and secrets when it is necessary for him to do so to prevent the client from committing a crime, or to defend himself against an accusation of wrongful conduct. "The rationale for the last of these exceptions is: It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. ABA Opinion 250." *Doe v. A Corp.*, 709 F.2d at 1048. Douglas was defending herself against an accusation of wrongful conduct by Poindexter.

Pursuant to Louisiana State Ethics Rule 1.6 (b) (2), a lawyer may reveal such informtion (relating to representation of a client) to the extent the lawyer reasonable believes necessary: (2) *"To establish a* **claim or defense** on behalf of the lawyer in a controversy between the lawyer and the client...,or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

Furthermore, Professor McCormick in his highly regarded treatise provides:

"The weight of authority seems to support the view

> that when client and attorney become embroiled in a controversy between themselves, . . . the seal is removed from the attorney's lips . . . as to what is controversy between lawyer and client and decisions do not limit their holdings to litigation between them, but have said that whenever the client . . . makes an imputation against the good faith of his attorney in respect to [her] professional services, the curtain of privilege drops so far as necessary to enable the lawyer to defend [her] conduct. Perhaps the whole doctrine, that in controversies between attorney and client the privilege is relaxed, may best be based upon the ground of practical necessity that if effective legal service is to be encouraged the privilege must not stand in the way of the lawyer's just enforcement of [her] rights to be paid a fee and to protect [her] reputation. McCormick, *McCormick on Evidence* (3d. ed. 1984) §91, pp.221-222. (Emphasis added)

The evaluation review meeting that Poindexter had with Douglas on June 22nd was an imputation against the good faith of Douglas regarding her services as an attorney. For example, Poindexter accused her of exercising poor judgment in her responses to the questions in the EEO audit and he also accused her of violating a bar ethics rule. At the point of time of the performance evaluation meeting, there was a controversy between the lawyer and the client. Therefore Douglas was entitled to bring a defense on her behalf to the controversy with her employer-client regarding her professional services, a controversy which was initiated by Poindexter, her supervisor.

This position is also supported by the ABA Model

Disciplinary Rules 4-101 c(4), which provides an even more explicit authorization for Douglas's Response Letter. It provides:

> © A lawyer may reveal:
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

In addition to her right to defend herself against accusations of professional wrongdoing, Douglas was entitled to reveal information she obtained during her tenure as in-house counsel to pursue her claim of race and gender discrimination and retaliation.

As stated by the trial judge, providing a copy of her Response Letter to Richard O'Neill was not unreasonable, "Mr. O'Neill had participated in the EEO audit, on behalf of the DOE; it was largely because of the plaintiff's comments at the audit that she received what she perceived to be a negative performance evaluation." See trial judge's Order and Reasons in the appendix at Page B-3. In addition, O'Neill had two other hats he was wearing; whistle blower officer and receiver of EEO complaints. Douglas did not say to O'Neill, "this is not a whistle blower complaint." She said she was not sure at that time, and that she would have to consult with her lawyer. Before she could get back to him, she was fired. The Response Letter was clearly an EEO complaint in that it complained of retaliation for her comments in the EEO audit, race and gender discrimination.

Therefore, in delivering her Response Letter, Douglas was pursuing her claim of discrimination and retaliation through the proper person at DOE and pursuant to the DOE contract provision. Because she was pursuing her claim in a controversy with her employer-client, she was allowed under Ethics Rule 1.6 (b) (2) to disclose information she obtained in the representation of her employer-client.

The holding of this Court that *any* betrayal of a client's confidences that breach the ethical duties of the attorney places that conduct outside Title VII's protection is overly broad. The California Supreme Court held that "under circumscribed conditions, an in-house counsel may pursue a wrongful discharge claim for damages against his corporate employer even though a judgment ordering his reinstatement is not an available remedy" *General Dynamics Corp. v. Superior Court (Rose)*, 876 P.2d 487, 502 (1994). The Court viewed the in-house counsel situation as being

> more analogous to that of corporate managers or senior executives who owe their livelihoods, career goals and satisfaction to a single organizational employer, than to that of an attorney in the traditional attorney-client relationship. Unlike the law firm partner, who typically possesses a significant measure of economic independence and professional distance derived from a multiple client base, the economic fate of in-house attorneys is tied directly to a single employer, at whose sufferance they serve.

Id. at 491. Corporate managers and senior executives owe a fiduciary duty to the corporation and to the stockholders

of the corporation. Under the holding of this panel, if a corporate executive breaches that fiduciary duty, does she lose her opposition clause rights against retaliation by the company that are normally protected by Section 704(a)?

Under the Fifth Circuit's overly broad opinion, an in-house counsel is not protected from company retaliation if she complains about discrimination to any third party, even if it is a government agency, if she includes any information obtained while she was employed at the company. Is this rule consistent with the purposes of Title VII?

The panel's holding as a matter of law that the in-house counsel's actions were a violation of the state bar's ethics rules, improperly usurped the fact-finding function of the jury, in violation of the Civil Rights Act of 1991, which gave a right to a jury trial to Title VII actions. The trial court found that there was minimal disclosure of any substantive information and that any indiscretion on Douglas's part did not warrant much consideration. The Fifth Circuit did not disagree with the trial court's characterization that it was a minimal disclosure of any substantive information. The Fifth Circuit concluded that even a minimal disclosure of information is enough to overturn a jury verdict and a trial judge's opinion.

There was no finding by the jury and no finding by the district court judge that there was unethical conduct by Douglas. The Fifth Circuit has substituted its factual inferences for the jury's reasonable factual inferences in violation of the standard set in *Hiltgen v. Sumrall*, 47 F3d 695 (5th Cir 1995). The panel decision overturns a jury verdict for minimal disclosure of information to DOE, which DOE already had. This violates the Civil Rights Act of 1991,

which specifically added the right to jury trial.

CONCLUSION

For all of the foregoing reasons, Petitioner Kordice M. Douglas urges that this Honorable Court grant her application for writ of certiorari; that the Clerk of the U.S. Fifth Circuit Court of Appeals be requested to certify and transmit the record in No. 96-30883, "Kordice M. Douglas v. DynMcDermott Petroleum Operations Company; John Poindexter", that a briefing schedule be set, and that after all due proceedings are had herein, the judgment of the U.S. Fifth Circuit of Appeals be reversed and the jury verdict and judgment of the district court be reinstated.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-30883

FILED
JUN 18 1998

KORDICE M. DOUGLAS,

Plaintiff - Appellee-Cross-Appellant,

versus

DYNMcDERMOTT PETROLEUM OPERATIONS COMPANY; JOHN POINDEXTER,

Defendants - Appellants-Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

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Before JOLLY, DAVIS, and BARKSDALE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case presents the question whether an in-house counsel's disclosing informally to third parties information

relating to interoffice complaints of discrimination against her constitutes a breach of her professional ethical duties of confidentiality and loyalty, and if so, whether such conduct is protected under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. We hold that, although an attorney's unethical disclosures may constitute opposition to practices made unlawful by Title VII, such conduct is nevertheless unprotected under Title VII (and § 1981) as a matter of law. Accordingly, we reverse the verdict and judgment of the district court.

DynMcDermott Petroleum Operations ("DynMcDermott") is a private corporation that employs over 900 individuals and manages the Department of Energy's (the "DOE") Strategic Petroleum Reserve facilities. Kordice Douglas is a black female attorney. She was hired by DynMcDermott to review procurement contracts, oversee ongoing litigation, and assist DynMcDermott's human resources department with legal issues. As in-house counsel, she was privy to all of her employer's legal files and confidential information concerning employee disputes.

Before signing on with DynMcDermott, Douglas worked as in-house counsel for Boeing Petroleum Services, Inc. ("BPS"), the company that previously had managed the petroleum reserve facilities. DynMcDermott successfully bid on the management contract for the facilities and took over its administration in 1993. More than 90% of BPS employees made the transition to employment with DynMcDermott, including Douglas who initially began work with DynMcDermott on April 1, 1993, without a temporal gap between employment. Douglas's job responsibilities and salary remained the same except that she also was assigned to serve

as the primary legal contact for the human resources department of DynMcDermott.

The relationship between DynMcDermott and the DOE was purely contractual and at arm's length. Under the contract, DynMcDermott simply agreed to perform certain managerial and administrative services for the DOE. The contract required that DynMcDermott operate free from discriminatory practices, but DynMcDermott neither implicitly nor explicitly waived any of its rights of confidentiality or privilege with respect to its in-house counsel. In connection with the antidiscrimination provision, DOE officials met with DynMcDermott employees at various times to assure that DynMcDermott was complying with this aspect of the contract ("EEO audits"). Just such a meeting occurred on June 6, 1994, between John Poindexter-DynMcDermott's general counsel and Douglas's supervisor—and three DOE employees.

Poindexter requested that Douglas attend the June 6 meeting because she was familiar with the DOE's particular areas of inquiry regarding DynMcDermott's employment practices. DynMcDermott was unhappy with Douglas's professional conduct at this meeting. Specifically, the DOE auditors asked if Douglas were aware of any equal pay claims of women at the different sites. Douglas indicated that she was not, but further responded, "Maybe I'll get my money now. "[1] When informed by the DOE of a large number of

[1] This remark arose in the context of demonstrating Douglas's alleged dissatisfaction with her salary. Douglas submits that she previously had discussed her dissatisfaction with her salary with Poindexter, that he had failed to take any action on her behalf, and that her remark at the audit was a protest of her allegedly unequal pay.

complaints that it had received from DynMcDermott employees, Douglas also voluntarily offered her opinion that it was a dangerous situation — "a class action waiting to happen." She further informed the auditors of one particular employee's (Becky Roussell's) discrimination complaint that had not been resolved to the employee's satisfaction. The day after the meeting, Douglas disclosed to the DOE attorney, who had initiated the audit, additional information—allegedly confidential—regarding her investigation into Ms. Roussell's claim.[2]

Two weeks after the meeting with the DOE auditors, Poindexter met with Douglas to discuss her written performance evaluation. One of the comments in the evaluation indicated that Douglas had failed to exercise good judgment during the June 6 meeting with the DOE officials. Douglas objected to several critical comments in her evaluation, including one concerning her alleged lack of discretion during the DOE meeting. Poindexter upwardly adjusted several specific ratings, but maintained her overall evaluation of "fully satisfactory."

Douglas was still dissatisfied with her performance evaluation. Thus, a few days later, she composed a five-page response (hereinafter "Response Letter" or "Response" or "Letter") to her evaluation in which she complained that she had been subjected to racial and sexual discrimination. She also further discussed events surrounding Becky Roussell's complaint and a separate business matter that she had

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[2] The day after the audit, Douglas told the DOE attorney that she had prepared a report of the "Becky incident," but that she thought DynMcDermott's Human Resources Department managaer had changed the report.

handled for DynMcDermott involving BellSouth Mobility. Douglas presented her Response Letter not only to Poindexter but also to three other DynMcDermott employees, and to Richard O'Neill, a whistle-blower officer with the DOE. Upon inquiry from O'Neill, however, Douglas confirmed that the DOE was not to treat the Response as a whistle-blower complaint.

When DynMcDermott learned that Douglas had furnished her Response Letter to an individual outside the confines of the company, it convened a "termination board" to discuss the consequences of Douglas's actions. The board members included the president, the director of human resources, the deputy project manager, and Poindexter, the company's general counsel. After meeting several times and conducting research into Douglas's attorney-client duties of loyalty and confidentiality and the company's duties under the antidiscrimination statutes, the board unanimously agreed to terminate Douglas's employment. DynMcDermott informed Douglas of the decision on July 7, 1994.

After her termination, Douglas forwarded her Response Letter to several other individuals outside DynMcDermott, including the local head of the NAACP, Congressman William Jefferson, and Hazel O'Leary, the Secretary of the DOE. In addition to the Letter, Douglas also furnished O'Leary with a package of DynMcDermott's private documents gathered from the company's legal files before she was discharged. She later filed a claim of discrimination with the EEOC alleging as the sole basis of liability that DynMcDermott retaliated against her when she "opposed practices made unlawful under Title VII." The EEOC issued her a right-to-sue letter and she timely filed an action in federal

district court.

II

Douglas filed suit in the Eastern District of Louisiana against John Poindexter, DynMcDermott, and other corporations connected to DynMcDermott alleging (1) retaliation under Title VII, (2) retaliation under 42 U.S.C. § 1981, (3) conspiracy under 42 U.S.C. § 1985, (4) race discrimination under § 1981 regarding her right to enter into future employment contracts as an attorney, (5) race and sex discrimination under Title VII, and (6) state law claims for defamation, intentional infliction of emotional distress, and gender discrimination. She sought back pay, compensatory and punitive damages, injunctive relief, and reinstatement with DynMcDermott or front pay. Ruling on the defendants' motion to dismiss, the court dismissed Douglas's § 1981 retaliation claim and her § 1985 conspiracy claim, but otherwise allowed her action to proceed to trial.

The jury returned its verdict finding that Douglas was not terminated because of her race or sex, but that she was discharged in retaliation for engaging in activity protected under Title VII. The jury refused to award front pay, but allowed $7,830 in back pay, $238,840 in compensatory damages, and $375,000 in punitive damages.[3]

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[3] The two verdict forms provide in relevant part:

VERDICT FORM

1. Do you find by a preponderance of the evidence that plaintiff's race was a determining factor in DynMcDermott's decision to discharge her?

Yes ____ No X

The district court entered judgment for Douglas for $621,670 against DynMcDermott and Poindexter, dismissed all claims against the remaining defendants, and denied

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footnote 3 continued

PROCEED TO QUESTION NO. 2.

2. Do you find by a preponderance of the evidence that plaintiff's sex was a determining factor in DynMcDaermott's decision to discharge her?

Yes _____ No X

PROCEED TO QUESTION NO. 3.

3. Do you find by a preponderance of the evidence that a determinative factor in the plaintiff's discharge was that she engaged in an activity protected by Title VII?

Yes X No _____

PROCEED TO QUESTION NO. 4.

4. a) Do you find by a preponderance of the evidence that defendant John Poindexter made a defamatory statement about the plaintiff to a third person?

Yes _____ No X

IF YOU ANSWERED "NO" TO PART "a," PROCEED TO QUESTION NO. 5. IF YOU ANSWERED "YES" TO PART "a," PROCEED TO PART "b."

b) Do you find that the statement was privileged, that is made by the defendant in good faith with an interest of duty to a party with a

front pay and reinstatement after finding that Douglas would have been legitimately terminated for her unethical conduct

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footnote 3 continued
corresponding interest or duty?

Yes _____ No _____

PROCEED TO QUESTION NO. 5.

5. a) Has plaintiff proven by a preponderance of the evidence that the conduct of defendant John Poindexter was extreme and outrageous?

Yes _____ No X

IF YOU ANSWERED "NO" TO PART "a," PLEASE SIGN AND DATE THIS FORM BELOW AND ANSWER NO FURTHER QUESTIONS. IF YOU ANSWERED "YES" TO PART "a," PROCEED TO PART "b."

b) Has plaintiff proven by a preponderance of the evidence that defendant John Poindexter desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from this conduct?

Yes _____ No _____

VERDICT FORM

* * *

4. a) Do you find that the defendants would have legitimately terminated the plaintiff based on statements made by the plaintiff to Lansen Barrow the day after the audit interview with the plaintiff?

Yes _____ No X

of gathering internal legal documents before her discharge. The court subsequently amended the judgment to comport with the statutory cap on compensatory and punitive damages under Title VII, which reduced Douglas's final award to $307,830, and memorialized that Douglas prevailed only on her Title VII claim of retaliation against DynMcDermott and Poindexter. All parties appealed.

III

DynMcDermott[4] argues, in sum, that Douglas disclosed client confidences in her Response Letter, that her actions thus cannot be classified as "protected activity" under Title VII's opposition clause, and that she was terminated because of her unethical disclosures and not because of her participation in any protected activity. Douglas counters that the evidence adduced at trial supports the jury's verdict that she engaged in protected activities and that those activities prompted DynMcDermott to retaliate against her by terminating her employment. Further, in making her own appeal Douglas

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footnote 3 continued
PROCEED TO PART "b."

b) Do you find that the defendants would have legitimately terminated the plaintiff for collecting records that belonged to DynMcDermott's legal department prior to her termination on July 7, 1994?

["Yes" written in]

* * *

[Signed and dated by the jury foreperson]

[4] For convenience, we will refer to both DynMcDermott and Poindexter as DynMcDermott, unless specifically addressing an issue relevant only to Poindexter.

argues that the district court erred in dismissing her retaliation claim under § 1981 and that we should reinstate the jury's total award of damages because § 1981 has no statutory damages cap.

We need not reach the latter issues because we hold that Douglas's conduct constituted a breach of her duties of confidentiality and loyalty to DynMcDermott, that, accordingly, the conduct was not protected activity as a matter of law, and that DynMcDermott therefore did not unlawfully retaliate against her when it terminated her employment because of that conduct.

IV

We employ a deferential standard of review when examining a jury's verdict for sufficiency of the evidence. *Ham Marine, Inc. v. Dresser Indus., Inc.*, 72 F.3d 454, 459 (5th Cir. 1995). "Unless the evidence is of such quality and weight that reasonable and impartial jurors could not arrive at such a verdict, the findings of the jury must be upheld." *Ham Marine*, 72 F.3d at 459. We may not reweigh the evidence, re-evaluate the credibility of the witnesses, nor substitute our reasonable factual inferences for the jury's reasonable inferences. *Hiltgen v. Sumrall*, 47 F.3d 695, 699-700 (5th Cir. 1995). We must view the evidence in the light most favorable to upholding the jury's verdict and may only reverse if the evidence points "so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary conclusion." *Hiltgen*, 47 F.3d at 700; *Pagan v. Shoney's, Inc.*, 931 F.2d 334, 337 (5th Cir. 1991). Questions of law, of course, we review *de novo*. *United States v. O'Keefe*, 128 F.3d 885, 893 (5th Cir. 1997), *cert. denied*,

___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 1998 WL 130816 (1998); *Munn v. Algee*, 924 F.2d 568, 575 (5th Cir. 1991).

V

A

Douglas is a member of the Louisiana Bar and is thus governed by the Louisiana Rules of Professional Conduct. She is duty-bound, as are all lawyers, not to disclose her client's confidences without authorization and loyally to serve the interests of her client. Rule 1.6 provides in toto:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was

> involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Louisiana State Bar Articles of Incorporation, Rules of Professional Conduct, Rule 1.6, La. Rev. Stat. Ann. § 37:219 Ch.4-App., Art. 16 (hereinafter "Ethical Rule" 1.6).[5] Thus, except under specified limited circumstances, an attorney may not divulge her client's confidences. *See United States v. Cavin*, 39 F.3d 1229, 1308 (5th Cir. 1994); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1124 (5th Cir. 1988) (noting that disclosing material facts to third persons may breach duty to keep confidences as required by good ethics), *vacated on other grounds sub nom. Frvar v. Abell*, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989). A "confidence" in this context means exactly what the rule says—any "information relating to representation of a client." Ethical Rule 1.6 (a); *see also Prennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979) (noting ethical duty of confidentiality is broader than evidentiary privilege; confidentiality involves all "information" gained in representation, as opposed to "confidence" or "secret").

In addition to the duty of confidentiality, Ethical Rule 1.7 provides that "[l]oyalty is an essential element in the lawyer's relationship to a client." The duty of loyalty to the client, with which the duty of confidentiality is inherently intertwined, is one of the basic tenets of the legal profession. *Cavin*, 39 F.3d at 1308. The obligations of this profession are

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[5] The ethical rules provide us with guidance in evaluating an attorney's conduct appearing before us as they set out the profession's own articulation of its ethical standards. *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 n.5 (5th Cir. 1979).

not "merely hortatory appeals to [one's] conscience," but enforceable strictures of a lawyer's conduct. *Id.; McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1264-65 (5th Cir. 1983) ("An ethical code is not a garment that lawyers may don and doff at pleasure."). Violation of one's ethical duties can lead to sanctions as severe as disbarment.

These duties—confidentiality and loyalty—serve to fortify the client's trust placed with the attorney and to ensure the public's confidence in the legal system as a reliable and trustworthy means of adjudicating controversies. *See In re American Airlines, Inc.*, 972 F.2d 605, 618-20 (5th Cir. 1992) ("The trust a lawyer's duty of loyalty inspires in clients encourages them freely to confide in the lawyer and freely to rely on the advice provided by the lawyer.") (citing *E.F. Hutton & Co. V. Brown*, 305 F.Supp. 371, 395 (S.D. Tex. 1969); *Duncan v. Merrill Lynch*, 646 F.2d 1020, 1027 (5th Cir. 1981) ("[T]he integrity of the judicial system would be sullied if courts tolerated . . . [the unethical disclosure of confidential information] by those who profess and owe undivided loyalty to their clients.")); *McCuin*, 714 F.2d at 1265 ("The purpose . . . [of eithical precepts] is to preserve public confidence in the bar and in the legal process.").[6]

B

(1)

Against the backdrop of these declarations

[6] For a contrary view as to the necessity of the duty of confidentiality, see Danier R. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1 (Winter 1998) (submitting that the duty of confidentiality is used as an economic incentive that benefits the legal profession more than the client or the public).

demonstrating the obligations of confidentiality and loyalty in a lawyer's relationship with her client, we must first determine whether Douglas breached her professional ethical duties. We therefore turn to the specifics of the information that Douglas disclosed to persons outside DynMcDermott.[7] In her Response Letter, Douglas wrote:

> I wish to deal with one instance specifically. The complaint of Becky R. regarding Brian S. I interviewed Becky and looked at the documentation and wrote a response. I specifically asked John Poindexter if I could speak to Eugene T. and Brian S. I was told No. I turned the letter over to him. I never heard a response. In the performance evaluation meeting, he told me he spoke to Brian S. privately. This is an example of disparate treatment. Brian S. can get a private consultation about something that was documented, but, yet, I am asked to listen more and improve my interpersonal relationships with other employees in writing in a performance evaluation.

She also discussed in some detail her handling of a business matter with BellSouth Mobility on behalf of DynMcDermott. She included in her Response Letter her employer's wishes with respect to the matter and the steps she took in dealing

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[7] In her brief, Douglas notes that the evidence would not support a finding that DynMcDermott terminated her employment because of the disclosures she made during the EEO audit or in the conversation she had with a DOE officer a day after the meeting. We agree that the evidence is clear that these disclosures were not the basis for DynMcDermott's decision to discharge her. Therefore, like the parties, we restrict our discussion to the information revealed in Douglas's Response Letter that she disseminated to outside parties.

with the file.[8]

The disclosed matters clearly include information that Douglas gained through her representation of her client, DynMcDermott, and is "*information* relating to representation of [that] client." Ethical Rule 1.6 (a) (emphasis added). As we have noted before, the "use of the word 'information' . . . is particularly revealing of the drafters' intent to protect all knowledge acquired from a client. . . . This is true without regard to whether someone else may be privy to it." *Brennan's, Inc.*, 590 F.2d at 172. The disclosed matters thus, pursuant to Ethical Rule 1.6 (a), constitute confidences and Douglas divulged them to the DOE. The next question to be considered is whether Douglas's indiscretions amounted to a breach of her duties of confidentiality and loyalty.

(2)

Douglas first contends that her disclosures were justified because she reasonably understood the DOE to be her client along with DynMcDermott. This argument is patently implausible. DynMcDermott alone hired her, directed her, and paid her salary. Douglas completely understood that DynMcDermott was her sole employer There

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[8] For instance, Douglas noted that when a BellSouth Mobility matter became a problem, DynMcDermott turned the file over to her. She set out in her Response Letter what actions she took with respect to the matter, such as contacting BellSouth Mobility and all of the involved employees and drafting a payment agreement. She also stated that Carol Parrella, presumably employed as part of DynMcDermott's upper management, did not want DynMcDermott's employees to sign the payment agreement and that she drafted a second agreement. All of these disclosures were "information relating to representation of a client" under Rule 1.6 and thus constituted confidential information.

is no evidence that the DOE ever retained or relied on her services as an attorney or that DynMcDermott consented to any dual representation by her. *See* Ethical Rules 1.7, 1.13 (setting out prerequisites before attorney may consent to dual representation; noting duties specific to corporate counsel).

Douglas had been engaged in the practice of law for almost fifteen years when DynMcDermott hired her. If she is serious in her contention that she considered the DOE to be her client in conjunction with the corporation she was specifically employed to represent, she has a distorted understanding of her professional duty. DynMcDermott was her client; it hired her and paid her. The DOE was not her client; indeed, the DOE was a potential adversary to her client. DynMcDermott therefore reasonably expected her loyally to represent it—which obviously encompassed the expectation that she would not disclose its confidences to third parties.

In the alternative, Douglas argues that because she was instructed as in-house counsel for her former employer, BPS, to treat the DOE as her client, it was reasonable for her to assume that DynMcDermott also desired that she maintain a similar relationship with the DOE when DynMcDermott took over management of the petroleum reserve facilities. From this assumption, Douglas extrapolates that DynMcDermott consented to the disclosures under Ethical Rule 1.6 (a). That Douglas's former employer may have so consented is irrelevant. DynMcDermott—her one and only client during the time at issue—did not expressly or impledly consent to any such arrangement or to the disclosures here involved. *See* Ethical Rule 1.6 (a). In sum, Douglas cannot ethically justify her disclosure of client confidences to the DOE under

Ethical Rule 1.6 (a) because (1) DynMcDermott was her sole client and (2) DynMcDermott did not consent to the disclosures.

(3)

Because she revealed to third parties information relating to her representation of DynMcDermott—i.e., the company's handling of an internal complaint and her dealings with the BellSouth Mobility matter—Douglas breached the duty of confidentiality unless the disclosures fall within one of the limited exceptions in Ethical Rule 1.6 (b). Douglas maintains that she ethically revealed the confidential information because she reasonably believed that the matter she publicized to the DOE was necessary to establish her claims of discrimination in the workplace.[9] In her Response Letter, she cited an example of alleged disparate treatment in the companys procedures for handling internal complaints: She received a written report that would be placed in her employment file while 'Brian S."—a white male— was only privately

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[9] A second exception allowing disclosure occurs when an attorney reasonably believes it necessary "to respond to allegations in any proceeding concerning the lawyer's representation of the client." Ethical Rule 1.6 (b) (2). Here, however, when Douglas made the disclosures, no "proceeding" was ongoing between DynMcDermott and Douglas.

Because Douglas represented an organizational client, an additional exception may theoretically be available under Ethical Rule 1.13 ("[I]f a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action . . . in a matter related to the representation that is a violation . . . of law which reasonably might be imputed to the organization, . . . the lawyer shall proceed as is reasonably necessary in the best interest of the organization." Ethical Rule 1.13. Douglas has not urged this section as a basis for her actions in this appeal, however, and we generally do not consider arguments that have not been raised by the parties. *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 n.3 (5th Cir. 1998).

reprimanded.[10]

Although we have doubts as to whether Douglas's disclosures of confidential information reasonably were necessary to establish a claim of discrimination, we need not address this issue because she simply was not attempting to establish a "claim or defense" on her behalf in a controversy with DynMcDermott when she provided the DOE officer with a copy of her Response Letter containing client confidences. When the DOE officer asked whether he should treat the Letter as a whistle-blower complaint, Douglas responded that he should not do so at that time. This negative answer leads ineluctably to the conclusion that Douglas's disclosures do not fall within the narrow exception contained in Ethical Rule 1.6 (b) (2). We thus conclude that the evidence establishes as a matter of law that Douglas breached her duty of confidentiality, and thereby her duty of loyalty, to DynMcDermott.

C

(1)

We must next determine, in the light of our conclusion that Douglas violated her ethical obligations, whether Douglas demonstrated that DynMcDermott unlawfully retaliated against her when it terminated her employment.

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[10] Demonstrating that similarly situated employees were not subjected to adverse employment actions for engaging in conduct identical to that in which the plaintiff engaged may be illustrative of discrimination. *Nieto v. L&H Packing Co.*, 108 F.3d 621, 623 & n.5 (5th Cir. 1997); *Barnes v. Yellow Freight Sys., Inc.*, 778 F.2d 1096, 1101 (5th Cir. 1985). We note, however, that Douglas proffered no meritorious argument justifying her revelations with respect to the BellSouth Mobility matter.

Title VII imposes liability for unlawful retaliation where (1) the employee engaged in activity protected by Title VII, (2) the employer took adverse employment action against the employee, and (3) a causal connection exists between that protected activity and the adverse employment action. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 705 (5th Cir.), *cert. denied*, _____ U.S. _____, 118 S.Ct. 336, 139 L.Ed.2d 260 (1997); *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir. 1992). The ultimate determination is whether, "but for" the protected conduct, the employer would not have engaged in the adverse employment action. *Long v. Eastfield College*, 88 F.3d 300, 305 n.4 (5th Cir. 1996); *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1571 (5th Cir. 1989) (noting employee must prove causation-in-fact); *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985) (same).

Activities protected under title VII fall into two broad categories—opposition and participation. An employee has engaged in protected activity when she has (1) "opposed any practice made an unlawful employment practice" by Title VII or (2) "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3 (a); *Grimes v. Texas Dep't of Mental Health & Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996). Douglas claims protection under both prongs.

(2)

(a)

Douglas first contends that she engaged in protected participation when she responded to the DOE officers' ques-

tions at the EEO audit and when she disseminated her Response Letter to O'Neill. As we have suggested *supra* in footnote 7, no evidence indicates that DynMcDermott was motivated to terminate Douglas because of her comments during the EEO audit.[11] Although clearly unhappy with her remarks at the audit, the evidence shows that DynMcDermott was satisfied to address that matter in its performance review. Douglas's conduct during the EEO audit is relevant to her discharge only as part of the background to her subsequent response to her performance rating. We thus focus only on the repercussions associated with Douglas's Response Letter.

(b)

Douglas maintains that her Response Letter also constitutes protected participation because it "should have been forwarded [by the DOE] to the EEOC." The participation clause affords protection under Title VII by prohibiting retaliation for assistance and participation in *any manner* "in an investigation, proceeding, or hearing" under the

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[11] Although the evidence will not support a finding that DynMcDermott was motivated to fire her because of her conduct in the EEO audit, Douglas maintains that sufficient evidence supports a finding that the comments she made in the EEO audit resulted in the "low" rating she received on her evaluation and that her rating is thus evidence of retaliation, albeit not of retaliatory discharge. This contention is meritless. In the first instance, DynMcDermott rated her performance as "fully satisfactory." We find it difficult to ascribe as low a "fully satisfactory" rating. Second, even were we to allow that the rating Douglas received was "low," the evidence is insufficient to demonstrate that the evaluation itself constitutes an adverse employment action actionable under Title VII. *See Matttern*, 104 F.3d at 707; *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995); *Landgraf v. USI Film Prods.*, 968 F.2d 427, 431 (5th Cir.),. *aff'd*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

statute. 42 U.S.C. § 2000e-3 (a); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (5th Cir. 1997); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n.18 (5th Cir. 1969). Douglas, however, specifically instructed O'Neill not to treat the Letter as a whistle-blower complaint. She thus did not participate in an "investigation, proceeding, or hearing" within Title VII's parameters and her five-page Response Letter, informally given to third parties, does not fall within that class of activities protected under the participation clause.

(3)

(a)

Our determination that Douglas's conduct does not qualify for protection under the participation clause does not end our inquiry, however, because we must also consider whether we may fairly characterize the Response Letter as an opposition activity. Douglas's response purports to complain of racism, sexism, and retaliation—all of which Title VII deems unlawful employment practices. As such, the Letter appears to meet the litmus test for activity constituting opposition under Title VII. We thus assume, for the purposes of this opinion, that Douglas's Response qualifies as opposition activity.

Not all activities taken in opposition to an employer's perceived discriminatory practices, however, remain insulated from reprisal under Title VII's shield. *Smith v. Texas Dep't of Water Resources*, 818 F.2d 363, 365-66 (5th Cir. 1987); *Jones v. Flagship Int'l*, 793 F.2d 714, 727 (5th Cir. 1986). We have recognized that some conduct, even though engaged in with the most sincere of intentions, may be so inappropriate

as to justify the curtailment of statutorily-afforded safeguards. *Jones,* 793 F.2d at 727.

Our precedents have employed a balancing test to determine whether Title VII's protections may be denied to an employee's activities that adversely affect his effective performance of job duties. *Jones,* 793 F.2d at 727. "[T]he employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare.' " *Jefferies v. Harris County Community Action Ass'n,* 615 F.2d 1025, 1036 (5th Cir. 1980) (quoting *Hochstadt v. Worcester Foundation for Experimental Biology,* 545 F.2d 222, 230-34 (1st cir. 1976)). The yardstick against which the employee's conduct must be measured is the flexible and protean doctrine of "reasonableness in [the] light of the circumstances." *Jefferies,* 615 F.2d at 1036.

For instance, in *Rosser v. Labaorers' Int'l Union of North America, Local No. 438,* we held that the plaintiff's form of opposition was unprotected as a matter of law. 616 F.2d 221, 224 (5th Cir. 1980). The plaintiff in that case had been employed as the dues-posting clerk for the secretary-treasurer of the union. After being approached by black union members who felt the union was discriminating against them, Rosser decided to run against her boss for his elected position. She eventually was disqualified from the race and was discharged from her employment with the union after her boss was re-elected. Rosser contended that she was fired in retaliation for her engagement in opposition activity. We agreed that she was fired because of her opposition activity, but we ruled in favor of the defendant on the basis that Rosser's form of opposition—seeking her boss's job—placed her loyalty and cooperation in serious doubt and accordingly

fatally diminished her effectiveness as a dues-posting clerk. *Rosser*, 616 F.2d at 224. We held that her conduct was thus unprotected under Title VII as a matter of law and that her employer therefore had a legitimate non-discriminatory reason for discharging her. *Id.*

We have since reaffirmed *Rosser*'s analysis, noting that "[t]here may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not covered by § 704 (a)." *Jones*, 793 F.2d at 727 (quoting *Rosser*, 616 F.2d at 223).

In *Jefferies*, this court faced a situation that bears some similarity to the conduct found in this case. The plaintiff was a black female who, while employed by the defendant, copied and disseminated confidential employment records that tended to document her belief that she was a victim of discrimination. After her termination, Jefferies sued for unlawful retaliation, arguing that her conduct was protected because she had been attempting to bring attention to an employment practice that allegedly discriminated against her. *Jefferies*, 615 F.2d at 1036. After weighing "the employer's right to run his business" against Jefferie's right "to express [her] grievances and promote [her] own welfare," we determined that the plaintiff's form of opposition was unprotected. *Id.* We noted that Jefferies's conduct was clearly unreasonable in the light of the circumstances and her employer legitimately discharged her because of it. *Id.*

Jones is yet another of our precedents that have found employee conduct unprotected under Title VII. Just as the

conduct in *Jefferies* is similar to that of Douglas's publishing confidential information—, the plaintiff's position of trust in *Jones* is approximate to that enjoyed by Douglas before her termination. Like Douglas, Jones was a licensed attorney hired by Flagship to handle charges of discrimination lodged against it and to represent it before state and federal administrative agencies, including the EEOC. *Jones,* 793 F.2d at 716. Flagship fired Jones after learning that she had filed a charge of discrimination with the EEOC, had solicited others to join in her suit, and intended to serve as the named representative of a class action against her employer. We determined that her conduct was unprotected under Title VII because it rendered her ineffective for the position for which she was retained. *Id.* at 728.

(b)

These precedents bring us to the immediate case we consider today. They serve to illustrate that employee conduct, although fairly characterized as protest of or opposition to practices made unlawful by Title VII, may nevertheless be so detrimental to the position of responsibility held by the employee that the conduct is unprotected. Douglas's behavior fits into this general category.

Furthermore, Douglas's conduct not only undermined her effectiveness as an employee, but her actions also violated the ethical rules of the legal profession. Here, while employed as in-house counsel for DynMcDermott, Douglas breached her professional duties of confidentiality and of loyalty when she revealed to a third party information relating to the represen-

tation of her client. She took no precautions[12] to preserve the attorney-client relationship and instead acted with thoughtless indiscretion, demonstrating little regard for the ethical obligations inherent in the legal profession. This dereliction of professional duties meant that DynMcDermott could no longer place full trust in her to keep confidences that she may acquire as its attorney. In short, the trust undergirding the attorney-client relationship was broken and Douglas could no longer function in her role as in-house counsel. *See Rosser*, 616 F.2d at 223 (noting that employee's conduct can so malign the relationship that continued employment is impossible). Her conduct, on the whole, also reflected poorly on the legal profession and its obligation to maintain standards of trust and loyalty.

We therefore turn to the weighing process that our precedents have employed in other similar contexts. We first weigh the importance of the employer's reasonable expectation that its in-house counsel abide by the profession's ethically imposed duties of confidentiality and loyalty. Corporations hire in-house counsel specifically with the expectation that the attorney's loyalty may be fully relied upon. A corporate lawyer is expected to defend her employer-client when adversary proceedings arise and may not with very limited and specified exceptions, act detrimentally to the employer-

12 Even when revealing confidences falls within an exception to the ethical rules, there are appropriate means for revealing confidences that limit the dissemination of information disclosed. They include requesting *in camera* review, requesting that the court seal the record in any proceeding, and obtaining permission to prosecute the action without revealing the true name of either party. *See, e.g., Doe v. A Corp.*, 709 F.2d 1043, 1045 n.2 (5th Cir. 1983); *United States v. Scott*, 909 F.2d 488, 494 n.10 (11th Cir. 1990) (noting different protective measures attorneys may take to protect client confidences when they suspect a client of intending to commit perjury).

client's interests. In fact, by accepting employment, a lawyer chooses to place his loyalties with his employer-client and agrees to act as its confidant and advocate. An in-house attorney enjoys a unique position of special trust, and her employer-client necessarily occupies a concomitant position of vulnerability with respect to its relationship with its counsel. The ethical precepts of confidentiality and loyalty serve to assure that that trust is not misplaced and to shield the employer-client from an abuse of the power that the attorney has acquired as a result of her unique position of confidence. The employer-client's reasonable expectation that its attorney will abide by the profession's ethical edicts is thus entitled to great weight.

In addition to weighing the interests of the employer in determining whether unethical conduct should be protected under Title VII, we, as a court, must also consider the interests of the legal profession, whose members' ethical conduct is critical to the integrity and reputation of the courts and their processes. It is axiomatic that the legal profession has a vital interest in promoting the ethical conduct of its members, and as strong an interest in discouraging unethical conduct. These interests would be struck a damaging blow if the law afforded some safe harbor for unethical conduct. To forgive a breach by allowing the legal protections sought in this case obviously would have repercussions beyond this one case because such a ruling would carve out a class of individual rights that trump professional ethical considerations—and, by extrapolation, could lead to further tolerances with unanticipated consequences to the profession,

and thus become yet another bissagiatt.[13] The particular duties at stake here—confidentiality and loyalaty—are of indisputable importance to the attorney-client relationship itself, as this opinion has repeatedly pointed out. Furthermore, they instill a faith in the system necessary for the public to trust our legal system in the resolution of its disputes—again, as we have made abundantly clear in this opinion.

Furthermore, when an attorney is granted the privilege of joining the ranks of this profession, she agrees to abide by the ethical rules of the profession. These obligations are fully understood by the attorney and, thus, the profession's expectation that its members will obey its internal canons is also reasonable. Finally, the ethical rule that Douglas breached, with its noted exceptions, is a reasonable rule to require of in-house counsel as well as of the profession generally.

We next weigh an attorney's right under Title VII to oppose allegedly discriminatory practices by her employer. It is an extremely important right that we do not gainsay in the least. But in engaging in the balancing exercise here, we must be more specific. The specific right asserted by Douglas is the right to oppose the allegedly unlawful practices of her employer-client, and to do so in such a manner that violates the ethical duties of the legal profession. As we have noted, when Douglas became an attorney, she became bound to abide by the ethical rules of the profession. When she was hired as an attorney by DynMcDermott, she

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[13] William Rasberry, *Defining Deficiency Down*, the Washington Post, May 29, 1998, at A27 (coining the acronym "bissagiatt" from the phrase "But It Seemed Such a Good Idea at the Time").

became its defender and advocate. Although she surely did not surrender her Title VII rights when she signed on with DynMcDermott as its in-house counsel—and no one is suggesting that she did——she did in fact assume professional responsibilities that constrained her exercise of these rights.

Requiring adherance to the profession's ethical precepts does not strip an attorney of all Title VII protections. Indeed, ethical Rule 1.6 specifically provides for disclosure once disclosure becomes necessary in a dispute with the employer-client, Rule 1.6 surely does not bar Douglas's opposition and protest in her conversations, dialogue, and remonstrations with her employer-client.

In sum, although the right to oppose unlawful practices under Title VII is a right that, independently, is entitled to great weight in the balancing test, the exercise of that right in violation of the profession's ethical duties of confidentiality and loyalty simply will not counter the weight of the employer-client's rights and the duty owed to the legal profession.

We therefore conclude that when an attorney's Title VII right to oppose her employer-client's allegedly discriminatory practices by disclosing confidential information contrary to the ethical obligations of the profession is balanced against her employer-client's right to ethical representation and the profession's interest in assuring the ethical conduct of its members, the employer's and the profession's interests must prevail. Given the obligations to which an attorney agrees when she joins the profession and when she accepts employment, and the importance of the duties of confidentiality and loyalty to the employer-client

and to the integrity of the profession, we hold as a matter of law that conduct that breaches she ethical duties of the legal profession is unprotected under Title VII.[14]

In reaching this holding, we are aware that the trial court determined that there was "minimal disclosure of any substantive information" and, therefore, that any indiscretion on Douglas's part did not warrant much consideration. This conclusion was error because, as we hold today, any betrayal of a client's confidences that breaches the ethical duties of the attorney places that conduct outside Title VII's protection.[15] The employer-client need not tolerate baby steps of unethical conduct while anxiously wondering when and if the giant step will occur, and with what consequences. Once the trust between attorney and client is breached in violation of professionally sanctioned duties. Title VII

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[14] Douglas also maintains that the district court erred when it dismissed her § 1981 claim for retaliatory discharge on the basis that such a claim was not cognizable. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 179-80, 109 S.Ct. 2363, 2374, 105 L.Ed.2d 132 (1989); *Carter v. South Central Bell*, 912 F.2d 832, 840 (5th Cir. 1990) (holding that § 1981 does not encompass retaliatory discharge claims). She contends that the Civil Rights Act of 1991 superseded *Patterson* and *Carter* and now allows such a claim. We need not reach this issue because, even were employees now able to bring retaliatory discharge claims pursuant to § 1981, we hold as a matter of law that DynMcDermott did not engage in unlawful retaliation when it terminated Douglas's employment because of her conduct that constituted ethical violations of her professional duties.

[15] Conduct that does not constitute a breach of the legal profession's ethically imposed obligations, but that nevertheless adversely impacts the employment relationship between an in-house counsel and her employer-client, remains subject to the balancing test set out in *Jefferies* and *Jones* before it may be determined to be unprotected conduct under Title VII.

provides no shield from retaliation.[16]

[16] As is obvious from our opinion, we do not address violations of Title VII against an attorney that, although arising from the same factual scenario, occur independent of the ethical breach. We only make it clear that an attorney who violates her profession's ethical rules is not entitled to any damages flowing from retaliation taken by her employer-client because of her violative conduct. So long as the conduct actually constituted a violation of the profession's ethically imposed duties, the employer is insulated from liability irrespective of whether it took adverse employment action because the conduct constituted a breach or because the conduct was in opposition to discriminatory employment practices. *See Rosser*, 616 F.2d at 224 (holding opposition activity unprotected even though motive for discharge remained disputed).

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
NOV 7 '96

KORDICE M. DOUGLAS	CIVIL ACTION
VERSUS	NO. 95-1967
DYNMCKERMOTT PETROLEUM OPERATIONS CO. AND JOHN POINDEXTER	SECTION C

ORDER AND REASONS

Defendants, DynMcDermott Petroleum Operations Co., Inc. and John Poindexter ("Defendants") have filed a motion for judgment as a matter of law or, in the alternative, motion for remitter and denial of punitive damages. The plaintiff, Kordice M. Douglas, opposes. For the reasons stated below, the amount of recovery for compensatory and punitive damages is reduced to $300,000, the motion is otherwise denied.

Judgment as a matter of law is appropriate if a party has been fully heard on an issue and "there is no legally sufficient evidentiary basis for a reasonable jury to find for

that party on that issue." Fed. Rule of Civil Procedure art. 50(a); *Seven-Up Co., v. Coca-Cola Co.,* 86 F.3rd 1379, 1387 (5th Cir. 1996). Such a judgment should be granted only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict. *Boeing Company v. Shipman.* 411 F.2d 365, 374 (5th Cir.1969) (en banc).

Did the Plaintiff Engage in a Protected Activity?

The defendants first argue that the plaintiff was not engaged in a protected activity under Title VII (a) when she participated in the DOE audit and (b) when she disseminated her response to her performance evaluation.

A person participates in protected activity when the person either "oppose(s) any practice made an unlawful employment practice under this subchapter" or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 USC§2000e-3.

With respect to the DOE audit, it is undisputed that the audit was for the purpose of reviewing DynMcDermott's EEO policies and complaint procedures. Such policies and procedures, as well as their audits, would be unnecessary but for Title VII. Arguably then, the audit itself was a "proceeding" that falls within the ambit of §2000e-3. Certainly, Ms. Douglas "participated" in that audit and her comments were made in conjunction with it.

Furthermore, Ms. Douglas' first remark at the audit constituted a personal complaint, even if jokingly made, of her

own disparate pay and her second remark was a warning of possible legal liability for unlawful employment practices at the site in general. Both of these, social grace aside, could reasonably be considered expressions of opposition to practices made unlawful under Title VII. That her employer reacted with such displeasure underscores that her comments were construed by the defendant as a criticism of the company's performance in that area. Consequently, the Court finds there was a "legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."

Even if the above were not sufficient, the Court finds that the plaintiff's dissemination of her five page response to her performance evaluation was clearly protected activity. The Document itself alleges sexism, racism and retaliation. The defendants do not strongly argue otherwise, but rather rely on a claim that the dissemination outside DynMcDermott (specifically to Richard O'Neal of the DOE) was unreasonable and therefore unprotected. This is a significant point because defendant Poindexter stated that the reason the plaintiff was terminated was because she distributed her response to "persons outside of DynMcDermott."[1]

The Court finds that providing a copy of her response to Richard O'Neal was not unreasonable. Mr. O'Neal had participated in the EEO audit, on behalf of the Department of Energy; it was largely because of the plaintiff's comments at that audit that she received what she perceived to be a negative performance evaluation.

The crux of the defendants' complaint is that the

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[1] August 15, 1994 letter from John Poindexter to Lansen Barrow.

plaintiff disclosed confidential matters in her memorandum which should not have been disclosed to persons outside the company. These matters related to (1) bills from Bell South Mobility and (2) the manner in which other employees' performances were evaluated compared to hers. With respect to Bell South, the plaintiff's performance evaluation specifically referenced her handling of that matter as a reason for a negative rating. The plaintiff's response referencing it was therefore not unreasonable. Most of her explanation dealt with generic steps she took in handling the matter, with minimal disclosure of any substantive information. Likewise, her discussion of "Becky R." and "Brian S." did not disclose any substantive in-house information. It also related directly to the plaintiff's complaint that she was the victim of disparate treatment in her performance evaluation. For those reasons, the Court finds there was a 'legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."

Were Punitive Damages Justified?

The jury awarded the plaintiff $375,000 in punitive damages. The defendants argue that the evidence was insufficient to show malice or a reckless indifference to the federally protected right. In support, the defendants point to the various steps the defendants took prior to the termination: (1) forming a termination review board of top management level employees; (2) defendant Poindexter's testimony that he researched corporate counsel's responsibilities regarding confidentiality of the client; (3) presentation of that information to the review board and their subsequent discussions; (4) the unanimous decision to terminate the plaintiff; (5) the review by the Human Resources Director who certified that

the decision was not in violation of anti-discrimination law.

The jury in this case was attentive and specific. While it found sufficient evidence of retaliation, it rejected the plaintiff's claims of racial and/or gender discrimination. The jury also rejected her claim of defamation and intentional infliction of emotional distress. The jury also significantly limited the plaintiff's back pay on the basis of after-acquired evidence justifying termination.

The jury concluded that the given reason for the termination - that the plaintiff disclosed confidential matters to persons outside the company - was ill-founded and a pretext for the improper firing, a conclusion that was not unreasonable. This discerning jury could then reasonably conclude that the elaborate steps taken, including defendant Poindexter's alleged research, were intended as a deliberate smokescreen to hide their true motive. Such a conclusion would support a finding of malice or reckless disregard for the plaintiff's rights. There was a "legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'

Should the awards be reduced?

The defendants challange the award of $238,840 for compensatory damages and the award of $375,000 for punitive damages. Under 42 U.S.C. §1981a(b)(3), the plaintiff is entitled to an aggregate sum of no more that $300,000, combining both compensatory and punitive damages. Accordingly, the awards are reduced to a total of $300,000.

Should the backpay be reduced?

The jury awarded the plaintiff backpay of $7,830. The defendants claim the award should be limited to $5,075.75, an after taxes computation. The Court finds that the jury figure is reasonable and that an after tax asssesement is not appropriate as the backpay recovery is taxable.

Is the plaintiff entitled to compensatory or punitive damages arising after the date termination would have been justified?

The defendants argue that the after acquired evidence doctrine should not only limit the plaintiff's backpay but also her compensatory and punitive damages as well. The defendants can cite no binding authority for that propositon. Nor does this Court find the argument persuasive, at least in this factual situation.

/s/ G. Berrigan
District Judge

November 7, 1996.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-30883

FILED
JUL 23 1998

KORDICE M. DOUGLAS,

Plaintiff - Appellee-Cross-Appellant,

v.

DYN McDERMOTT PETROLEUM OPERATIONS COMPANY; JOHN POINDEXTER,

Defendants - Appellants-Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 6/18/98, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly

United States Circuit Judge

APPENDIX D

RESPONSE TO RETAILIATORY PERFORMANCE EVALUATION

My performance evaluation is in retaliation to answers to questions I provided to the recent EEO audit and my complaints about a hostile work environment. I am subject to disparate treatment and retaliation. I am a victim of sexism and racism.

I have complained to the General Counsel on numerous ocassions about the way people respond and react to the legal advice I give them and the way they react when I am placed in a position of authority. His reaction has been what do I expect him to do about it. In my performance evaluation, I am told that I create an unconfortable and confrontational environment. This comes after I have complained about numerous instances. I am told that I should be a better listener and be nicer. This is a stereotypical response to my demands for fair treatment. I am also told that I should be more of a team player. I am a team player. However, if I do not give someone the answer that they want to hear, than I am viewed as not being a team player. He can not point to any instance where I have given someone incorrect legal advice.

I am told that I should go out and look for work. This is disparate treatment. Randy and Charles, my co-workers are not told to go out and look for work. I am available to any person or department for legal advice and assistance. I was specifically told by John Poindexter that he did not like my comments to the DOE EEO auditors. I was told that I had

gotten the company in trouble. The negative evaluation on Judgment was specifically related to my response to the EEO audit. There were no other instances that were pointed out to me. I told the truth and feel that I properly responded to the questions presented to me. I can back up anything that I said. I feel that to evaluate me based on my responses in this area or any other area is retaliation for my answers to the DOE EEO audit.

I was given a negative rating on control and Follow-Up. There is not one instance when I have not followed up on any project. I keep a Things to Do list and keep accurate records. There were no goals or targets provided to me. If there are any instances, I wish an opportunity to respond to them specifically.

I was given a negative rating on Perceptual and Analytical. The only instance that was pointed out to me was the Bell South Mobility issue. Randy and John worked this project. After it became a problem the file was turned over to me. I contacted Bell South Mobility and all of the employees involved. I drafted a payment agreement and showed it to John Poindexter. He told me that Carol Parrella did not want the DM employees to sign this agreement because the DOE employees could not be forced to sign the agreement. For weeks, I left messages on his voicemail and went into his office twice to further discuss this matter. Finally, he called Chuck Herring and they discussed the matter. No follow up was given to me. They were supposed to have a meeting with Carol Parella. This past week I went in again and discussed the matter again. I drafted a new agreement, followed up with Bell South Mobility. I have records of the phone calls. I even noticed a mathematical error on the bill and pointed it out

to John Poindexter and Bell South Mobility. The employees I spoke to and Bell South Mobility can verify that I spoke to them. Therefore, I cannot understand this low score. This was the only incident that was pointed out to me. I am told that I should reduce outside distractions. I am a member of several Boards. At no time has my work been behind. I give a one day response on most matters. I return all phone calls on the same day unless I am out of town.

I am a member of the National Board of Directors of the American Corporate Counsel Association. This Board meets three times a year. This is a legal related activity. Any other organization would consider this an honor, but instead I am being criticized and ridiculed for my outside activities. I am a member of the Loyola Board of Visitors for the Business school. They meet in the morning for a breakfast meeting 2-4 times a year. Usually I am in the office by 9:00 A.M. Once a year they ask me to speak to the students at the school. I am a member of the Board of Directors of the Metropolitan Battered Womens Program. We meet at night. Once a year we honor the staff for lunch. I have been invited to speak at the ABA convention which will be held in New Orleans in August, 1994. I am on the ABA Steering Committee for the Minority In House Corporate Group. We meet once a year at the Convention on a week-end and all other meetings are held by conference call. ACCA also has conference call meetings. I have been unable to participate in those because John Poindexter said DM would not pay for the phone bill. The other members of the ABA steering committee pay for the calls to me. I document everything on my timecard. I was asked to participate in the local ABA EEOC luncheons. This is free, at lunch time various speakers speak to us about new labor topics and update us on new areas of the law. I

was told to cut back on these. I was specifically told that I have more activities than he and Randy combined. The activities which take me away from the office during daytime hours are legal related and increase my knowledge of the law. What amazes me is that my interpersonal skills can't be that bad since I am constantly asked to participate in these activities. I was nominated by the local chapter after having served as Vice-President and President for two years of the chapter. Loyola renominated me to serve on the Board. The ABA called me from Chicago and asked me to speak.

Finally, I wish to comment on the EEO audit. I was in my office. John Poindexter called me into his office. Three people from DOE were seated there. I did not know what was going on. They asked if I wanted John to leave. I said No because as far as I am concerned I had nothing to hide. I thought that they were the 401K auditors because Kim Kerr could not have lunch with me the day before because she was tied up with the auditors. After they identified themselves, I realized that this was something different. Nothing I said had not been said before to John Poindexter.

I wish to deal with one instance specifically. The complaint of Becky R. regarding Brian S. I interviewed Becky and looked at the documentation and wrote a response. I specifically asked John Poindexter if I could speak to Eugene T. and Brian S. I was told No. I turned the letter over to him. I never heard a response. In the performance evaluation meeting, he told me he spoke to Brian S. privately. This is an example of diparate treatment. Brian S. can get a private consultation about something that was documented, but, yet, I am asked to listen more and improve my interpersonal relationships with other employees in writing in a performance

evaluation. What claims have been stated against me? Why have not my cries and pleas for fair treatment been heard. I complained to my supervisor many times. I am a victim of disparate treatment, a hostile work environment and I have been retaliated against because I spoke up and voiced my concerns and complaints. I have much more but I will stop now. However, I wish the opportunity to defend my positsion and specifically answer any rumours, allegations or complaints against me. This document was written under tremendouse stress because I am very upset over this performance evaluation.

/s/ Kordice M Douglas

APPENDIX E

DynMcDermott Petroleum Operations Company
Strategic Petroleum Reserve

John A Poindexter
General Counsel

10102-JAP-94-0169
August 15, 1994

Lansen Barrow, Esq.
Office of Chief Counsel
United States Department of Energy
Strategic Petroleum Reserve
FE-441
900 Commerce Road East
New Orleans, Louisiana 70123

Dear Mr. Barrow:

Subject: Contract No. DE-AC96-93PO18000
Termination of Kordice M. Douglas

Reference: Letter from L. Barrow (DOE) to P. Turner (DM Human Resources), dated 8/11/94, subject: same

Following is DynMcDermott Petroleum Operations Company's (DynMcDermott) response to the allegations of Ms. Kordice M. Douglas as contained in her July 14, 1994, letter to Secretary O'Leary.

Ms. Douglas was not terminated due to comments made by her during the EEO audit interview. This is clearly indicated in the documentation furnished by Ms. Douglas. The EEO audit interview occurred on June 8, 1994. On June 22, 1994, the results of Ms. Douglas' Employee Performance Evaluation were discussed with her. Although Ms. Douglas had some areas that needed improvement, she was rated "Fully Satisfactory".

The evaluation of Ms. Douglas did focus on her conduct during the EEO audit interview. Specifically, she was told that the comments she made during the inteview were not responsive to the questions asked and that she did not exercise good judgment as an attorney by bringing up allegations against the company without first discussing the matter with her direct supervisor who is also the chief legal officer of the company. In addition, Ms. Douglas referenced specific legal matters to the audit interview team, which was confidential information that she had a legal and ethical obligation not to disclose to third parties.

Ms. Douglas was terminated due to the fact that on the very next day, June 23, 1994, she published the five page "Response to Retailiatory (sic) Performance Evaluation" to persons outside of DynMcDermott. This response, which contained confidential business information of DynMcDermott, was a further example of poor judgment and unethical behavior on the part of Ms. Douglas.

In her continued appeal, she has further dsiplayed the same lack of professional ethics for which she was terminated by publishing sensitive legal documents to anyone who might listen to her. Such further violation leaves DynMcDermott

no option but to pursue legal remedies to cause these disclosures.

Ms. Douglas' termination did not involve sexism or racism to any degree. She was terminated because her violation of legal ethics created a condition in which she could no longer be entrusted with legal matters involving DynMcDermott.

The company policy regarding terminations as it relates to "Involuntary Termination of Employment", is as follows. The company's definition states that it is a discontinuation, through DynMcDermott's initiative, of the employer-employee relationship. Circumstances include discharge for cause or reduction in force. A copy of the termination policy can be provided in full text which outlines the parameters of severing employer-employee relationships. Moreover, it states that "the company reserves the right to terminate the employment of any employee at any time, with or without cause", and goes on to stipulate that DynMcDermott will not discriminate against any person.

The termination was immediate due to the seriousness of the ethical violations and the fact that DynMcDermott management lost confidence in Ms. Douglas' ability.

Should you need further clarification regarding this matrer, please contact the undersigned.

Sincerely,

/s/ John A. Poindexter
John A. Poindexter
General Counsel